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In the Supreme Court of the United States

OCTOBER TERM, 1980

FAIRDALE FARMS, INC., PETITIONER

v.

YANKEE MILK, INC., AND REGIONAL COOPERATIVE MARKETING AGENCY, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether an association of dairy cooperatives that does nothing more than establish prices for its members' milk is immune from price-fixing liability under Section 1 of the Sherman Act.

2. Whether the Capper-Volstead Act and Section 6 of the Clayton Act immunize from liability under Section 2 of the Sherman Act a dairy cooperative's acquisition and maintenance of monopoly power through the voluntary enrollment of all producers in its marketing area.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner Fairdale Farms, Inc. ("Fairdale") is a producer and processor of milk. It buys raw milk from other producers in New York, Vermont, and Massachusetts, and sells its processed product in the same three states (Pet. App. 2a, 40a). Respondent Yankee Milk, Inc. ("Yankee") is a 6,000 member dairy cooperative embracing producers in New England and New York (*id.* at 40a). Respondent Regional Cooperative Marketing Agency, Inc. ("RCMA") is an entity created by Yankee and six other northeastern dairy cooperatives to set prices for their members' milk (*id.* at 2a).

Prior to 1974, a portion of Fairdale's raw milk was supplied by members of Yankee (Pet. App. 2a). Subsequently, when RCMA set milk prices above federal order levels,[1] Fairdale objected and ultimately turned from Yankee to alternative sources of supply (*id.* at 3a). Fairdale then sued Yankee and RCMA, alleging that they had violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2. Fairdale conceded that Yankee was a qualified agricultural cooperative under the Capper-Volstead Act, 7 U.S.C. 291, and was immune from antitrust liability for fixing the prices of its members' milk. Fairdale contended, however, that Capper-Volstead immunity does not extend to the operation of RCMA by Yankee and other exempt cooperatives, since RCMA performs no marketing function or service other than fixing prices for the cooperatives. Fairdale also claimed that the Capper-Volstead Act does not immunize dairy cooperatives from liability under Section 2 of the Sherman Act if they intentionally seek and obtain monopoly power. Fairdale asserted that cooperatives could be liable under Section 2 even if they have not engaged in predatory or exclusionary conduct.[2] Yankee and RCMA argued, in contrast, that they were exempt from liability under Section 2 unless their actions in seeking or achieving monopoly power were "predatory" in nature (Pet. App. 12a).

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[1]Under the Agricultural Adjustment Act, 7 U.S.C. 601 *et seq.*, the U.S. Department of Agriculture issues "federal orders" for marketing areas prescribing a minimum pricing system for milk qualified under such orders. See 7 U.S.C. 608c(5) and (18). Producers and their cooperatives, however, can and sometimes do charge "above-order" prices or "premiums" for their milk.

[2]See, *e.g.*, Memorandum of Plaintiff Fairdale in Opposition to Motions for Summary Judgment 76-77; Reply Brief of Appellant in the court of appeals 16.

All parties moved for summary judgment on the Section 1 price-fixing claim. Yankee and RCMA moved for summary judgment on the Section 2 monopolization claim as well.

2. The district court dismissed the Section 1 claim. It found that RCMA, which consists of exempt cooperatives, qualifies for immunity to the same extent as its members, either as an "association" of producers or as a "marketing agen[t] in common" under Section 1 of the Capper-Volstead Act, 7 U.S.C. 291 (Pet. App. 4a). While the court accepted Fairdale's contention that RCMA's sole function was to fix prices for its members (*id.* at 4a-5a), it concluded that the Capper-Volstead Act immunized that function from antitrust challenge even though RCMA engaged in no other marketing activity (*id.* at 12a).

The district court refused to dismiss the Section 2 claim. It held that Fairdale was not required to prove that Yankee and RCMA engaged in predatory, *i.e.*, intentionally anticompetitive, practices to sustain its complaint (Pet. App. 23a). It is not clear, however, whether the district court believed that some anticompetitive conduct, beyond mere voluntary organization of producers into a cooperative, is necessary to prove a violation of Section 2, or whether the court believed that organization of producers into a cooperative to achieve monopoly power is sufficient by itself to constitute illegal monopolization. Compare Pet. App. 20a-21a with *id.* at 14a-15a.

3. The court of appeals affirmed the dismissal of Fairdale's Section 1 claim essentially for the reasons stated by the district court (Pet. App. 41a-44a). With respect to the Section 2 claim, however, the court of appeals concluded (Pet. App. 55a) that it was not clear whether the district court had denied summary judgment solely "on the premise that the mere accretion of power from formation of a cooperative is sufficient to violate that section." Such a premise,

the court of appeals noted, would be wrong as a matter of law. It thus remanded the monopolization claim so that the district court could state whether its refusal to grant summary judgment was based on the existence of material issues of fact concerning anticompetitive practices other than the organization of producers into cooperatives (*id.* at 44a-56a).

ARGUMENT

The court of appeals' decision does not conflict with any decision of this Court or any other court of appeals. Although we do not endorse all of the terminology used in the opinion of the court of appeals, the court appears to have adopted the correct legal principles and to have reached the correct result on the record before it. Further review is not warranted.

1. The court of appeals' conclusion that RCMA qualifies for Capper-Volstead immunity, even if it performs no marketing function other than setting prices for its members' milk, is in accord with the few existing cases specifically addressing this question. See *Northern California Supermarkets, Inc.* v. *Central California Lettuce Producers Cooperative*, 413 F. Supp. 984, 991-992 (N.D. Cal. 1976), aff'd per curiam, 580 F. 2d 369 (9th Cir. 1978), cert. denied, 439 U.S. 1090 (1979); *In re Central California Lettuce Producers Cooperative*, 90 F.T.C. 18, 54-63 (1977); see also *Treasure Valley Potato Bargaining Ass'n* v. *Ore-Ida Foods, Inc.*, 497 F. 2d 203, 214-216 (9th Cir.), cert. denied, 419 U.S. 999 (1974) (rejecting the argument that the term "marketing," as used in Section 1 of the Capper-Volstead Act, requires selling as well as collective bargaining activity as a prerequisite for immunity under Section 1 of the Sherman Act).[3]

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[3]Other cases have held that inter-cooperative price-fixing is immune from antitrust challenge even when no common association or marketing agency has been established for such purpose. *GVF Cannery, Inc.* v.

We believe that these decisions comport with the language and legislative history of the Capper-Volstead Act. Section 1 of the Act, 7 U.S.C. 291, authorizes farmers to form cooperatives, with or without capital stock, to operate for the mutual benefit of the member producers "in collectively processing, preparing for market, handling, and marketing" their products in interstate and foreign commerce. Section 1 also authorizes such associations to have common marketing agencies and to make all "necessary contracts and agreements to effect such purposes." As this Court has held, the express congressional authorization of "collective marketing" includes immunity for price-fixing. *Maryland and Virginia Milk Producers Ass'n* v. *United States*, 362 U.S. 458, 466 (1960). While "marketing" incorporates many activities that go beyond the mere fixing of price, there is nothing in the language of the statute that requires cooperatives to perform themselves all of the activities authorized by Section 1, or to perform a complete range of marketing functions, in order to qualify for the antitrust exemption. See *Northern California Supermarkets, Inc.* v. *Central California Lettuce Producers Cooperative, supra*, 413 F. Supp. at 992; *Treasure Valley Potato Bargaining Ass'n* v. *Ore-Ida Foods, Inc., supra*, 497 F. 2d at 214-215.[4]

California Tomato Growers Ass'n, No. C 80-1414 RPA (N.D. Cal. Apr. 15, 1981), slip op. 4-5; *United Egg Producers* v. *Bauer International Corp.*, 312 F. Supp. 319 (S.D.N.Y. 1970); *United States* v. *Maryland Cooperative Milk Producers, Inc.*, 145 F. Supp. 151 (D.D.C. 1956); see *Treasure Valley Potato Bargaining Ass'n* v. *Ore-Ida Foods, Inc., supra*, 497 F. 2d at 214 (dictum); *Kinnett Dairies, Inc.* v. *Dairymen, Inc.*, Civ. No. 1701 (M.D. Ga. Mar. 10, 1981), slip op. 41. No case, however, has focused on the meaning of the term "collectively" in Section 1 of the Capper-Volstead Act, as applied to the relationship among the members of a cooperative.

[4]The only limitations prescribed by Section 1 of the Act on "the kind of associations to which the legislation applies" (see H.R. Rep. No. 24, 67th Cong., 1st Sess. 1 (1921)), are: (1) the associations must include only "actual farmers" acting "collectively" (2) the associations must operate "for the mutual help of their members as such producers," (3)

Nor is there any indication in the legislative history of the Capper-Volstead Act that Congress intended to force integration of marketing functions as a precondition for collective price setting.[5] Congress did view cooperative marketing as a possible means to "shorten[] the road to market" by eliminating the costly middleman, thereby benefitting the consumer. See, *e.g.*, 62 Cong. Rec. 2060, 2216 (1922). But its primary purpose was to "maintain [the] self-respect and the dignity of * * * the farmer" by giving him "an opportunity to deal in selling his products on an equal footing with those who purchase it." H.R. Rep. No. 939, 66th Cong., 2d Sess. 2 (1920). Efficiencies of integration, while perceived as an added benefit of the legislation, were not its motivating force. Congress' principal goal was a better deal for farmers through collective bargaining and pricing power. 61 Cong. Rec. 1041 (1921); 62 Cong. Rec. 2218, 2225, 2257, 2260 (1922).[6]

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each member must be allowed one and only one vote, (4) dividends on stock must not exceed 8% per year, and (5) the associations must not deal in products of nonmembers in a quantity greater in value than the quantity handled for their own members. *Ibid.*; 7 U.S.C. 291.

[5]It is not clear that requiring more extensive integration than is involved in the collective setting of price would promote price competition. Faced with the choice of either integrating their activities beyond price-setting, dissolving and reforming as one larger cooperative, or forgoing price-fixing entirely, it seems likely that many cooperatives would choose the first or second alternative. Neither of those alternatives would increase competition significantly. Moreover, imposing such burdens and costs on producers might result in a loss of business efficiency. A decision by farmers or cooperatives not to integrate beyond the price setting function may reflect their judgment that greater integration would be less efficient. Policy considerations aside, however, the critical legal factor is that there is no evidence that Congress intended its grant of price fixing immunity to depend on the *form* in which bona fide agricultural producers engage in permissible collective activity including price fixing. See *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 28-29 (1962).

[6]Thus, farmers were given the right to use incorporated or unincorporated organizations roughly comparable to those that businessmen utilized, without disrupting the essential nature of farming. 61 Cong.

This Court repeatedly has held that exemptions from the antitrust laws are not lightly to be inferred,[7] and that even express exemptions are to be construed narrowly.[8] Nonetheless, in every case it is the congressional will that is the touchstone.[9] In the Capper-Volstead Act, Congress expressly allowed agricultural cooperatives to eliminate competition among producers by utilizing common marketing agencies. There is no evidence of a congressional intent to make this express antitrust exemption contingent on either a minimum degree of integration or a particular affiliation format. In these circumstances, the court of appeals correctly concluded that RCMA—all of whose members are qualified cooperatives[10]—is itself entitled to immunity from price-fixing charges.

Rec. 1043 (1921); 62 Cong. Rec. 2218, 2224, 2264 (1922). Through such organizations, farmers could develop the commercial experience and economies of scale that their corporate customers enjoyed. Congress hoped that farmers, through voluntary cooperation, would bargain as equals with large corporate buyers, and, to some extent, would replace them as "middlemen" in the marketing of farm goods. H.R. Rep. No. 24, *supra*, at 3; 61 Cong. Rec. 1033, 1035, 1040 (1921); 62 Cong. Rec. 2159, 2218, 2257, 2264 (1922).

[7]See, *e.g.*, *Gordon* v. *New York Stock Exchange*, 422 U.S. 659, 682 (1975); *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 372 (1973); *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 218 (1966).

[8]*Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 231 (1979); *United States* v. *Borden Co.*, 308 U.S. 188, 198-199 (1939); see also *Case-Swayne Co.* v. *Sunkist Growers, Inc.*, 389 U.S. 384 (1967); *Maryland and Virginia Milk Producers Ass'n* v. *United States*, *supra*, 362 U.S. at 465; *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531 (1978).

[9]*National Gerimedical Hospital and Gerontology Center* v. *Blue Cross*, No. 80-802 (June 15, 1981), slip op. 10, 14.

[10]There is no allegation that outsiders, *i.e.*, non-producers, are involved in the activities that are challenged in this case. Cf. *United States* v. *Borden Co.*, *supra*, 308 U.S. at 205-206; *Case-Swayne Co.* v. *Sunkist Growers, Inc.*, *supra*; *National Broiler Marketing Ass'n* v. *United States*, 436 U.S. 816, 822 (1978).

2. The court of appeals correctly held that a qualified Capper-Volstead cooperative may acquire and maintain monopoly power through the voluntary enrollment of producers without violating Section 2 of the Sherman Act. The court recognized, however, that acquisition or maintenance of monopoly power through any other anticompetitive means, whether predatory or not, subjects a cooperative to antitrust liability under Section 2. See *Pacific Coast Agricultural Export Ass'n* v. *Sunkist Growers, Inc.*, 526 F. 2d 1196, 1203-1205 (9th Cir. 1975), cert. denied, 425 U.S. 959 (1976) (rejecting claim that predatory acts must be proven to sustain a monopolization charge against an agricultural cooperative). In any event, even if, contrary to our understanding of the opinion of the court of appeals, the court intended to impose a higher anticompetitive conduct requirement in Section 2 cases brought against Capper-Volstead cooperatives, any legal error would not be outcome-determinative in this case. The activities challenged in this case as violative of Section 2 do not go beyond the attainment of monopoly power through voluntary membership. In these circumstances, plenary review by this Court is not necessary to correct ambiguous language in the opinion of the court of appeals.

a. As the court of appeals recognized (Pet. App. 44a-51a), the legislative history of Capper-Volstead[11] reveals

[11]We also refer to Section 6 of the Clayton Act, 15 U.S.C. 17, to the extent relevant. Section 6, enacted in 1914, provides that nothing contained in the antitrust laws shall be construed to prohibit the "existence and operation" of certain labor or agricultural organizations created for the purposes of mutual help, or to prohibit individual members of such orgnizations from "lawfully carrying out [their] legitimate objects." Section 6 also provides that such organizations and their members may not be held to be "illegal combinations or conspiracies in restraint of trade, under the antitrust laws." In 1922, the Capper-Volstead Act expanded Section 6 of the Clayton Act to cover cooperatives with capital stock and made explicit their right to market their members' produce. The court of appeals reviewed additional legislation (Pet. App. 48a-50a) to support its construction of the agricultural exemption.

that Congress did not intend to limit the growth of agricultural cooperatives by voluntary producer enrollment.[12] Thus, courts and commentators have acknowledged that a cooperative lawfully may acquire monopoly power—even control of 100% of a market—through voluntary membership enrollment of all producers. See *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 28-29 (1962); *GVF Cannery, Inc.* v. *California Tomato Growers Ass'n*, No. C 80-1414 RPA (N.D. Cal. Apr. 15, 1981), slip op. 6-7; *Kinnett Dairies, Inc.* v. *Dairymen Inc.*, Civ. No. 1701 (M.D. Ga. Mar. 10, 1981), slip op. 43; *Cape Cod Food Products, Inc.* v. *National Cranberry Ass'n*, 119

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[12]The language and legislative history of Section 2 of the Capper-Volstead Act, 7 U.S.C. 292, support this interpretation. Section 2 authorizes the Secretary of Agriculture to issue a cease and desist order against any cooperative that "monopolizes or restrains trade" to such an extent "that the price of any agricultural product is unduly enhanced by reason thereof * * *." This curb on "unduly" enhanced prices assumes that some monopolization, and even some enhanced prices, will prevail. Congress not only foresaw some aggregation of market power as a result of the legislation, but approved it within stated limits. 62 Cong. Rec. 2053, 2163, 2225 (1922); see 1 P. Areeda & D. Turner, *Antitrust Law* § 228d, at 186-187 (1978). Additional support for this view may be found in the defeat of the "Walsh Amendment." Senator Walsh proposed the following proviso to Section 1 as a substitute for Section 2, which was then contained in the House bill:

> Nothing herein contained shall be deemed to authorize the creation of, or attempt to create, a monopoly * * *.

S. Rep. No. 236, 67th Cong., 1st Sess. 1 (1921). As Senators Walsh and Pomerene described it during floor debates, the House bill would permit a monopoly, subject to regulation. The Senate bill, with the Walsh Amendment, would forbid monopoly entirely. 62 Cong. Rec. 2157 (1922). The Walsh Amendment was defeated for two reasons: first, because it was viewed as unnecessary, since Congress did not believe farmers could achieve dangerous monopoly power (62 Cong. Rec. 2218, 2261-2262, 2277-2278 (1922)), and second, because it was feared that it would nullify the purpose of Section 1, which was intended to permit farmers to combine (62 Cong. Rec. 2058, 2218, 2219, 2225, 2227, 2261-2262 (1922)).

F. Supp. 900, 907 (D. Mass. 1954); *Shoenberg Farms, Inc.* v. *Denver Milk Producers, Inc.*, 231 F. Supp. 266, 268 (D. Colo. 1964); 7 J. von Kalinowski, *Antitrust Laws and Trade Regulation* §§ 51.07[2], 51.08[3] (1980); L. Sullivan, *Handbook of the Law of Antitrust* 721 (1977); I P. Areeda & D. Turner, *Antitrust Law* § 228d, at 186 (1978); see also Pet. App. 51a-53a & nn.5-6.

The court of appeals correctly noted that, while " 'no illegality would attach' " to the attainment of monopoly " 'through natural growth or the voluntary affiliation with or attraction of new members' " (Pet. App. 53a; citation omitted), a cooperative may not acquire or exercise monopoly power "in a predatory fashion" (*ibid.*).[13] Nor, the court added (*ibid.*), may a cooperative use lawfully acquired monopoly power "to stifle or smother competition." The court referred to insistence on "exclusive dealing" contracts as an example of such forbidden anticompetitive conduct (citing *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F. 2d 263, 274 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980)) (Pet. App. 53a). By forbidding both predatory and competition-stifling conduct, the court of appeals appears to have recognized that cooperatives are liable for a broader range of misconduct than is encompassed by the term "predation." Moreover, since the antitrust legality of "exclusive dealing" contracts turns on the competitive effect of such contracts under a rule of reason analysis[14]—and not on

[13]The court did not define the term "predatory," but it listed various types of conduct that it viewed as examples of predatory conduct: picketing and harrassment, boycotts, coerced membership, and discriminatory pricing (Pet. App. 53a).

[14]See *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 329-331 (1962); *Standard Oil Co.* v. *United States*, 337 U.S. 293, 299, 310 (1949); *Dictograph Products* v. *FTC*, 217 F. 2d 821, 826-827 (2d Cir. 1954); *Bowen* v. *New York News, Inc.*, 366 F. Supp. 651, 678 (S.D.N.Y. 1973), aff'd in part, rev'd in part on other grounds, 522 F. 2d 1242 (2d Cir. 1975), cert. denied, 425 U.S. 936 (1976); *Curly's Dairy, Inc.* v. *Dairy Cooperative Ass'n*, 202 F. Supp. 481, 485 (D. Ore. 1962); III P. Areeda & D. Turner, *supra*, § 731a, at 247; L. Sullivan, *supra*, at §§ 163, 165.

anticompetitive intent—the court of appeals' reference to such contracts demonstrates that it was not condoning all anticompetitive conduct except willful or blatant predation.[15]

As we contended in our amicus curiae brief in the court of appeals,[16] it is confusing, as well as legally incorrect, to use the term "predatory" to categorize the type of activity that

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[15]We believe that the court of appeals' isolated reference to "predatory" behavior later in its opinion was nothing more than an attempt to use a shorthand or generic term to cover all types of anticompetitive conduct prohibited by Section 2 of the Sherman Act.

[16]The United States urged the court of appeals to reject the "predatory" behavior standard advocated by respondents in the district court as the basis for a finding of unlawfulness. Our amicus participation was prompted by a government appeal pending in the Sixth Circuit on a similar issue. *United States* v. *Dairymen, Inc.*, Civ. Action No. 7634A (W.D. Ky. Apr. 5, 1978), appeal pending, Nos. 79-3438, 79-3439 (6th Cir.). The district court in *Dairymen* found that the defendants had engaged in various anticompetitive practices, but it viewed as violative of Section 2 only acts deemed to be "predatory." While the court did not define the term "predatory," it apparently referred to conduct so blatantly anticompetitive that an anticompetitive purpose could be inferred. Under that erroneous approach, conduct that has a serious anticompetitive effect or potential effect but which does not, by itself, evidence an intent to restrain competition, is immunized.

The government argued on appeal in *Dairymen* that defendants' entire course of conduct was relevant to the Section 2 issue. That conduct included: (1) coercing processors not to buy milk from competing milk producers; (2) imposing full and committed supply agreements on processors; (3) threatening to withhold business from haulers who dealt with competitors; (4) flooding the market with milk without regard to profit or loss in order to injure competitors; and (5) acquiring 18 processing plants within a five year period, thus foreclosing outlets to competing producers. The district court looked at these acts in isolation, and found that, while several of them potentially could have substantial anticompetitive effects, only (3) and (4), above, were "predatory." As a result, it granted the government limited injunctive relief that did not extend beyond the conduct found to be "predatory."

In both *Dairymen* and the present case, the United States acknowledged that the Capper-Volstead Act permits agricultural cooperatives,

will subject a cooperative to antitrust liability. It is confusing because the term has no generally-accepted meaning, and thus is used differently by different courts.[17] More importantly, if the word "predatory" is used to require proof of willfulness not required when Section 2 of the Sherman Act is applied to other business entities, it represents an incorrect legal standard. Neither the language of Capper-Volstead nor the legislative history indicates a congressional intent to immunize all but the most blatantly anticompetitive conduct of cooperatives. To the contrary, the legislative history is replete with clear indications that, except for conduct integral to their organizational and joint marketing activities, cooperatives are to be treated like

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unlike commercial corporations, to achieve monopoly power by securing voluntary membership of all producers in its markets. But, beyond such voluntary enrollment, agricultural cooperatives are subject to the same constraints that apply to ordinary business corporations under Section 2 of the Sherman Act, whether or not their anticompetitive activities are so egregious as to be characterized as "predatory" or willful.

[17]For example, in *Maryland and Virginia Milk Producers Ass'n, supra*, 362 U.S. at 463, 467-468, this Court variously termed the challenged conduct "predatory" or "competition-stifling," and noted that the conduct was "so far outside the 'legitimate objects' of a cooperative that, if proved, [it] would constitute [a] clear violation[] of § 2 of the Sherman Act by this Association * * *" (*id.* at 468). In *United States* v. *Dairymen, Inc., supra*, the district court appeared to use the term to mean conduct so blatantly anticompetitive that an anticompetitive purpose could be inferred from the conduct itself (see note 16, *supra*). The court of appeals in this case, on the other hand, appears to have adopted a much broader view of the term (Pet. App. 53a-54a). See also *Treasure Valley Potato Bargaining Ass'n* v. *Ore-Ida Foods, Inc., supra*, 497 F. 2d at 216-217 n.11 (reviewing types of cooperative practices termed "predatory" by various courts); *Kinnett Dairies, Inc.* v. *Dairymen, Inc., supra*, slip op. 42 n.31 (noting varying definitions of the term predation ranging from "sinister" (*Telex Corp.* v. *IBM Corp.*, 510 F. 2d 894, 927 (10th Cir. 1975)) or "unnatural" business conduct aimed at injuring competition rather than advancing market position (L. Sullivan, *supra*, at 108, 111-112) to "unreasonable" or "unfair" methods of competition).

ordinary business firms. Abuses of the legitimate monopoly power that a Capper-Volstead cooperative lawfully may acquire were to be disciplined by the antitrust laws, as traditionally construed.[18]

In view of this legislative history, the lower courts repeatedly have held that non-predatory conduct can support a monopolization claim against an agricultural cooperative.[19] Indeed, the only other court of appeals to consider

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[18]61 Cong. Rec. 1033 (1921); 62 Cong. Rec. 2053, 2164 (1922); H.R. Rep. No. 24, *supra*, at 2-3; *Hearings on H.R. 2373 Before a Subcomm. of the Senate Comm. on the Judiciary*, 67th Cong., 1st Sess. 203-205 (1921), cited in *Maryland and Virginia Milk Producers Ass'n* v. *United States*, *supra*, 362 U.S. at 467 n.16.

[19]See *Treasure Valley Potato Bargaining Ass'n* v. *Ore-Ida Foods, Inc.*, *supra*, 497 F. 2d at 216 ("[a] cooperative can lose its exemption if it monopolizes, or attempts to monopolize, *or* engages in 'predatory practices' ") (emphasis added); *Case-Swayne Co.* v. *Sunkist Growers, Inc.*, 369 F. 2d 449, 451-452, 459 (9th Cir. 1966), cert. denied on Section 2 issue, 387 U.S. 932, rev'd on other grounds, 389 U.S. 384 (1967) ("[e]ven though the proof as to each of the specific acts may be insufficient in itself to establish wrongful use of monopoly power, the jury must look at the 'whole picture' * * * and draw the 'ultimate conclusion' "); *North Texas Producers Ass'n* v. *Metzger Dairies, Inc.*, 348 F. 2d 189, 194 (5th Cir. 1965), cert. denied, 382 U.S. 977 (1966) ("the association acts as an entity with the same responsibility under section 2 of the Sherman Act as if it were a private business corporation"); *Bergjans Farm Dairy Co.* v. *Sanitary Milk Producers*, 241 F. Supp. 476, 485 (E.D. Mo. 1965), aff'd, 368 F. 2d 679 (8th Cir. 1966) (Blackmun, J.) ("*any* use of [] monopoly power to increase and further its power, or to maintain it, when those actions are not inevitable, but are consciously done to increase or preserve the power constitute monopolizing") (emphasis added); *Cape Cod Food Products* v. *National Cranberry Ass'n*, *supra*, 119 F. Supp. at 907 (emphasis added) (a corporation is liable for monopolization "through a restraint of trade which was prohibited, or through a predatory practice, *or* through the bad faith use of otherwise legitimate devices"). But see *United States* v. *Dairymen, Inc.*, *supra* (discussed at notes 16 & 17, *supra*).

Although this Court has not addressed the issue directly, it appears to have recognized that, beyond the aggregation of market power through voluntary enrollment and the joint marketing functions explicitly protected by Section 1 of Capper-Volstead, the Act does not relieve agricultural organizations of the anti-monopolization constraints that are

the identical issue has rejected the contention that cooperatives are immune from Section 2 of the Sherman Act simply because their conduct is not "predatory." *Pacific Coast Agricultural Export Ass'n* v. *Sunkist Growers, Inc., supra*, 526 F. 2d at 1202, 1203-1205.

In these circumstances, it is inappropriate to infer that the court of appeals intended to create a narrow predation standard. See Pet. App. 53a-54a (citing *Berkey Photo, Inc.* v. *Eastman Kodak Co., supra*). Thus, while we believe that the court's use of the term "predatory" was ill-considered, our disagreement with the court's discussion may well be semantic rather than substantive. In any event, the issue need not be resolved on the facts of this particular case in its present interlocutory posture. The conduct challenged here—enlistment of producers in an association in order to acquire market power over price—is lawful no matter where the boundary line is placed. Definition of precisely which activities, beyond voluntary enrollment of members, are to be deemed indicia of unlawful monopolization or an attempt to monopolize would require the Court to go beyond this record and to address hypothetical facts. For this reason, we do not believe this case presents the monopolization issue raised by petitioner in a context appropriate for review.

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placed on ordinary business corporations. In *Maryland and Virginia Milk Producers Ass'n*, v. *United States, supra*, 362 U.S. at 463, 466, this Court held that Section 6 of the Clayton Act and the Capper-Volstead Act do not "immunize cooperatives engaged in competition-stifling practices from prosecution under the antimonopolization provisions of § 2 of the Sherman Act * * *"; "the general philosophy of both was simply that individual farmers should be given * * * the same unified competitive advantage—*and responsibility*—available to businessmen acting through corporations as entities" (emphasis added). And in *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co., supra*, 370 U.S. at 30, the Court stated that "cooperatives [are] liable for * * * monopolization," without implying any requirement of proof of "predatory" action.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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